

FEB 19 1943

FRANKLIN D. ROOSEVELT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 751

CHARLES A. MILLER,

Petitioner,

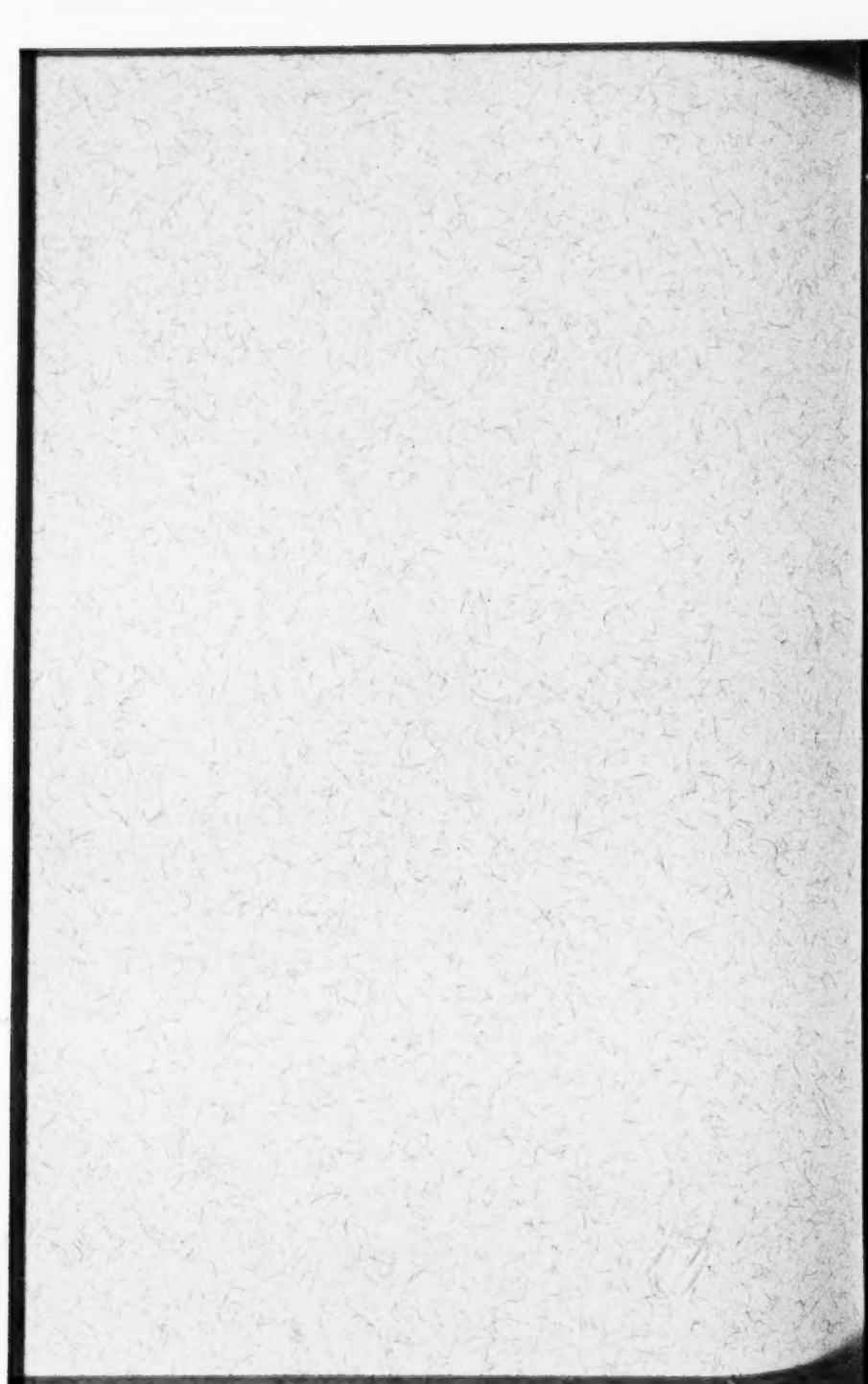
vs.

**WISCONSIN DEPARTMENT OF TAXATION AND
ELMER S. BARLOW, as COMMISSIONER OF TAXATION OF
THE STATE OF WISCONSIN.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN
AND BRIEF IN SUPPORT THEREOF.**

A. W. SCHUTZ,

Counsel for Petitioner.



INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari.....	1
Opinion for review.....	1
Statement as to jurisdiction.....	2
State statute involved.....	4
Summary statement of the matter involved.....	4
Questions presented.....	5
Manner and method of raising federal questions and lower rulings thereon.....	6
Reasons relied on for the allowance of the writ.....	9
Prayer for the writ.....	11
Brief in support of petition for writ of certiorari.....	13
I. The opinion of the court below.....	13
II. Jurisdiction.....	14
III. Statement of the case.....	14
IV. Specification of errors.....	14
V. Argument.....	15
Summary of argument.....	15
Question I—The State of Wisconsin and its tax- ing authorities were estopped from challeng- ing, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the State statute in controversy requiring husband and wife to submit to taxation on the basis of their com- bined income, the State and its taxing authori- ties having availed themselves of the advan- tages thereof for a period of approximately twenty years, commencing with the year of the enactment of the State Income Tax Act in 1911 and ending with the decision of this Court in <i>Hoeper v. Tax Commission of Wis-</i> consin, 284 U. S. 206, decided November 30, 1931.....	15

	Page
Question II—The Wisconsin Tax Commission, a creature of the State, was not entitled to urge the unconstitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of the State statute in controversy upon the facts in this case.	23
Question III—It was not within the competency of the State to disregard the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the due process clause of the Fourteenth Amendment. . . .	25
Question IV—The constitutionality of the statute in controversy (it is still on the statute books of the State of Wisconsin) should be upheld as valid legislation for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of <i>Hoeper v. Tax Commission of Wisconsin</i> , 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in <i>Hoeper v. Wisconsin Tax Commission</i> , 202 Wis. 493.	27
Question V—A recurrence to fundamental principles in support of the argument should not be out of order.	29
Conclusion.	31

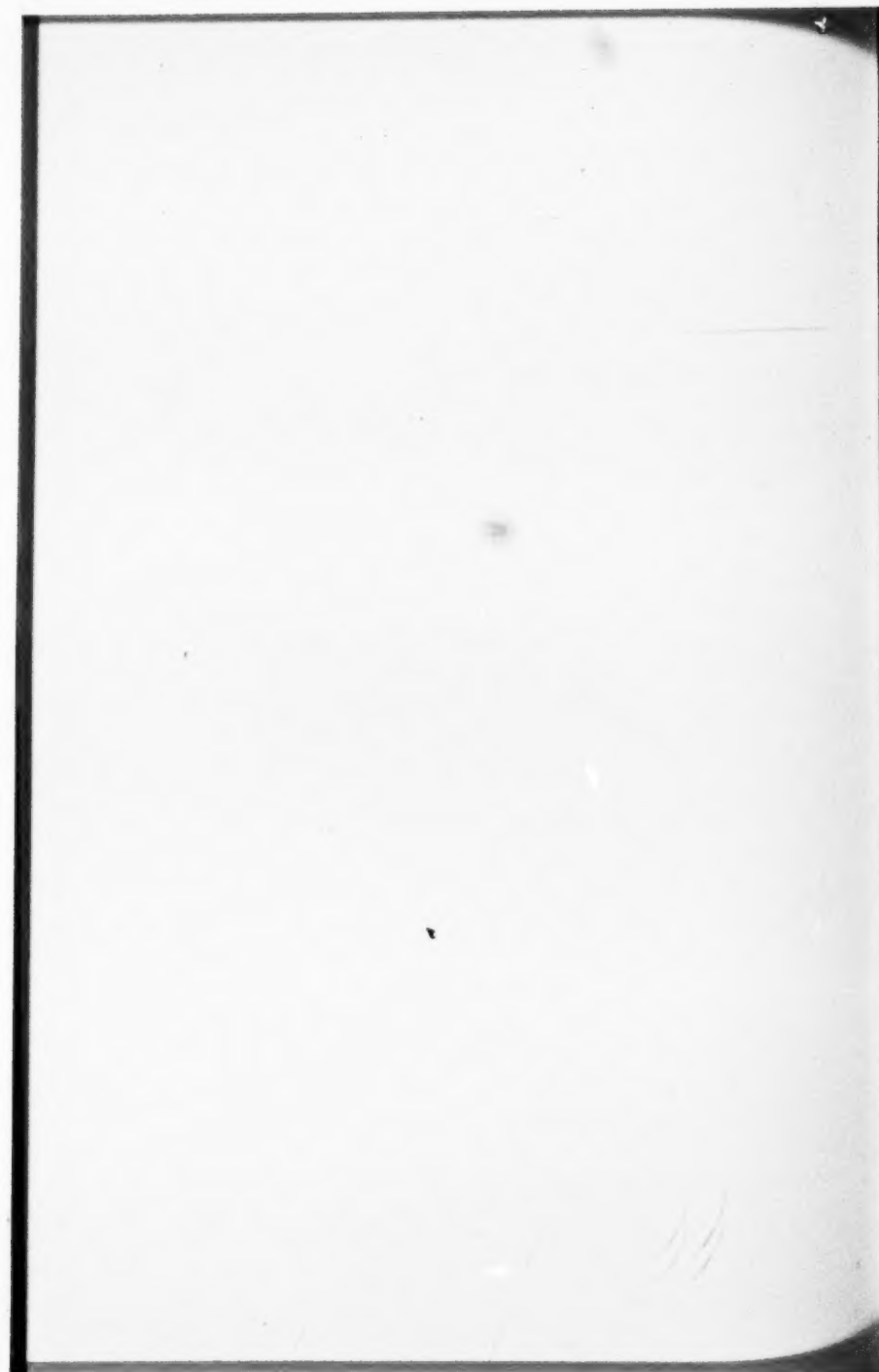
TABLE OF CASES CITED.

<i>Amerpohl v. Tax Commission</i> , 225 Wis. 62, 71, 72.	16
<i>Ashton v. Cameron County Water Improvement District, No. 1 of Texas</i> , 298 U. S. 513.	19
<i>Chicago, Indianapolis & Louisville Ry. Co. v. Hackett</i> , 228 U. S. 559, 566.	19
<i>Chicot County Drainage District v. Baxter State Bank</i> , (1940) 308 U. S. 371, 374, 375, 377.	3, 18, 25, 30
<i>Columbus and Greenville Railway Company v. W. J. Miller, State Tax Collector</i> , (1931) 283 U. S. 96, 99, 100.	3, 10, 23
<i>Daniels v. Tearney</i> , (1880) 102 U. S. 415, 418, 421.	3, 17, 30
<i>Hoeper v. Tax Commission of Wisconsin</i> , (1931) 284 U. S. 206, 218, 219, 220, 221.	3, 4, 6, 11, 15, 27

	Page
<i>Hoeper v. Wisconsin Tax Commission</i> , 202 Wis. 493, 495.....	5, 6, 11, 15, 28
<i>Income Tax Cases</i> , 148 Wis. 456, 513.....	5, 11, 28
<i>New York Rapid Transit Corporation v. City of New York</i> , (1938) 303 U. S. 573, 578.....	29
<i>Norton v. Shelby County</i> , 118 U. S. 425.....	19
<i>Shepard v. Barron</i> , (1904) 194 U. S. 553, 566, 567, 568, 571.....	3, 20, 30
<i>Sweeney v. State</i> , 251 N. Y. 417, 167 N. E. 519, 520.....	23
<i>Village of Norwood v. Baker</i> , 172 U. S. 269.....	20
<i>Wight v. Davidson</i> , (1901) 181 U. S. 371, 377.....	3, 18
<i>Woodruff v. Trapnall</i> , 51 U. S. 190, 207.....	22, 27

TABLE OF STATUTES CITED.

Section 71.09 (4) (c) Statutes of Wisconsin.....	4
Section 237 (b) Judicial Code (28 U. S. C. Section 344) ..	2



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 751

CHARLES A. MILLER,

vs.

Petitioner,

WISCONSIN DEPARTMENT OF TAXATION AND
ELMER S. BARLOW, AS COMMISSIONER OF TAXATION OF
THE STATE OF WISCONSIN.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of Charles A. Miller respectfully prays for a writ of certiorari to the Supreme Court of the State of Wisconsin to review the decision of said court rendered the 13th day of October, 1942, and the decision rendered therein on rehearing on the 8th day of December, 1942, being the final decision therein.

Opinion for Review.

The opinion sought to be reviewed is Charles A. Miller, Appellant, vs. Wisconsin Department of Taxation and

Elmer S. Barlow, as Commissioner of Taxation of the State of Wisconsin, Respondents, in the record herein, pages 44-46, 49.

Statement as to Jurisdiction.

This Court has jurisdiction to review said decision under Section 237 (b) of the Judicial Code (28 U. S. C. Section 344), viz:

“(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by an appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States; or *where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution*, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. — Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.” (The pertinent provisions are emphasized by counsel for petitioner.)

This case involves the constitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of a statute of the State of Wisconsin,

immediately hereinafter set forth, taxing the income of husband and wife as a unit, and the competency of the Tax Commission of the State to raise the question of its unconstitutionality as against the petitioner by a *retroactive* application of the majority opinion of this Court in *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206, holding that to tax such income as a unit was an arbitrary classification forbidden by the due process clause of the aforesaid Amendment, the petitioner having waived any claim of the unconstitutionality thereof when taxed thereunder, and both the State and the Commission having enforced the statute against petitioner for a period of years prior to said decision. The correctness of the State decision acquiescing in such unconstitutionality of the statute is involved because the petitioner contended both in the trial and appellate court that the minority opinion in the *Hoeper* case, written by Justice Holmes and concurred in by Justices Brandeis and Stone, holding such statute valid, is a correct interpretation of the due process clause of the Fourteenth Amendment in which it upheld the validity of this statute as a permissible classification under the due process clause of the Fourteenth Amendment.

The cases believed to support the jurisdiction of the court are as follows:

Columbus and Greenville Railway Company, v. W. J. Miller, State Tax Collector (1931), 283 U. S. 96, at page 99;

Hoeper v. Tax Commission of Wisconsin (1931), 284 U. S. 206, at pages 218, 219, 220 and 221;

Daniels v. Tearney (1880), 102 U. S. 415;

Chicot County Drainage District v. Baxter State Bank (1940), 308 U. S. 371, at pages 374 and 375;

Shepard v. Barron (1904), 194 U. S. 553, at page 567.

Wight v. Davidson (1901), 181 U. S. 371, at page 377.

The application of these cases is discussed in the brief filed herewith under the respective questions presented for review.

State Statute Involved.

The statute of the State of Wisconsin involved is Sec. 71.09 (4) (c), reading as follows:

“Married persons living together as husband and wife may make separate returns or join in a single joint return. The tax shall be computed on the combined taxable income. * * *”

Summary Statement of the Matter Involved.

For the calendar years 1926 to 1930, both inclusive, the petitioner and his wife filed joint income tax returns in obedience to and in conformity with the requirements of Section 71.09 (4) (c) of the Wisconsin Statutes, *supra*. Under this statute the *joint net* income of the spouses was alone taxed, the losses of one being offset against the gains of the other (R. 29); decision of Wisconsin Supreme Court herein. Thereafter and subsequent to the decision of this Court in *Hooper v. Tax Commission of Wisconsin*, 284 U. S. 206, decided November 30, 1931, wherein this Court held that the compulsory taxation of husband and wife on their joint income resulted in an arbitrary classification, the Commission assessed back taxes against petitioner in the sum of \$2,836.23 (R. 4, 5). The assessment arises wholly by reason of the retroactive application of the *Hooper* case by the Commission, namely, the separation by it of petitioner's income from the income of his wife, thereby resulting in the disallowance, in the computation of his income, of the offsetting losses of his wife (R. 17).

Both petitioner and his wife acquiesced in the levies originally made by the taxing authorities based upon the joint returns, made no objection thereto and paid the taxes

thereby assessed without protest. Neither at any time questioned the constitutionality of the statute of the State with respect to the income tax provisions under which said returns were made and taxes paid (R. 20, 29). The taxing authorities of the State, until the decision of this Court in the *Hoeper* case, November 30, 1931, uniformly enforced said provisions and the State availed itself of the advantages thereof for a period of approximately twenty years commencing with the year of the enactment of the Income Tax Act in 1911, *Income Tax Cases*, 148 Wis. 456, 513, *Hoeper v. Wis. Tax Commission*, 202 Wis. 493, 495.

In all of the tribunals which passed upon the taxpayer's contention in this case taxpayer uniformly contended that the decision of the United States Supreme Court in the *Hoeper* case did not rule the facts in his case; that the State taxing authorities were estopped to gain any advantage as against him from the unconstitutionality of its own acts; that the petitioner waived the right to stand upon his constitutional rights in the premises; that the State Tax Commission was without standing to question the constitutionality of the State statutes upon the facts in his case and that the additional exaction demanded of him was in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution (R. 20, 7 and 30).

Questions Presented.

I.

Whether the State of Wisconsin and its taxing authorities were estopped from challenging, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the above State statute requiring husband and wife to submit to taxation on the basis of their combined income, the State and its taxing authorities having

availed themselves of the advantages thereof for a period of approximately twenty years, commencing with the year of the enactment of the State Income Tax Act in 1911 and ending with the decision of this Court in *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206, decided November 30, 1931.

II.

Whether the Wisconsin Tax Commission, a creature of the State, was entitled to urge the unconstitutionality of the above State statute upon the facts in this case.

III.

Whether it was within the competency of the State to disregard the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the same clauses of the Fourteenth Amendment.

IV.

Whether the constitutionality of this statute, under the same clauses of the Fourteenth Amendment, should not be upheld as valid legislation, it being still on the statute books of the State of Wisconsin, for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in *Hoeper v. Wisconsin Tax Commission*, 202 Wis. 493.

Manner and Method of Raising Federal Questions and Lower Rulings Thereon.

QUESTIONS I AND II.

The first question and the second question corollary thereto were raised in the trial court in the assignment of

error appearing on page 7 of the record herein, paragraph (a) thereof, reading as follows:

“That the State may assail the constitutionality of its own exactions under the Fourteenth Amendment of the Federal Constitution prohibiting, among other things, the State from depriving any person of life, liberty or property, without due process of law, or denying to any person within its jurisdiction the equal protection of the laws, such amendment having been adopted for the protection of the individual against the encroachments of the State and not for the protection of the State against its own encroachments upon the rights of the individual.”

The trial court disposed of these questions adversely to the petitioner at pages 31 and 32 of the record, as will appear from this pertinent excerpt quoted therefrom:

“There is seemingly no question here as to whether a statute of this state is unconstitutional because it is said to infringe on the due process clause or violates other constitutional sanctions. The question appears to be whether an agency of the state may assert the fact of the previously adjudicated invalidity of an act and whether such agency is precluded from so asserting because of having previously participated in proceedings under the act. It is therefore seriously doubted whether any Federal question arises here. In any event the Federal decisions cited by appellant's counsel involve a variety of situations quite different from the one here existing.”

The adverse ruling of the State Supreme Court on the same questions will appear from the brief opinion of the State Supreme Court appearing at pages 45 and 46 of the record and which is appended hereto.

QUESTION III.

The third question was raised in the trial court in the assignment of error appearing on page 7 of the record herein, paragraph (b) thereof, reading as follows:

“The Supreme Court of the United States upon the appeal of the individual in *Hoeper vs. Wisconsin Tax Commission*, supra, did not hold that the individual may not waive the unconstitutional demand made by the State whereby it required its taxpayer to file a joint return with his wife and have his income combined with that of his spouse.”

The trial court disposed of this question adversely to the petitioner at pages 30 and 31 of the record, as will appear from this pertinent excerpt quoted therefrom:

“Appellant’s position when analyzed amounts to this: that the taxpayer may benefit as a result of his own voluntary relinquishment of a right. The doctrine of waiver is applied to prevent one from asserting what would otherwise be his right, and *not for the purpose of gaining a benefit* or imposing a detriment upon another. One party cannot ‘waive’ something to the detriment of another. * * *”

The State Supreme Court passed upon this question without adverting to it in its opinion by affirming the judgment of the trial court at page 46 of the record.

QUESTION IV.

The fourth question was raised in the trial court in the statutory brief of the petitioner and in the appellate Supreme Court, as will appear from the Motion for Rehearing appearing at page 47 of the record, particularly the following excerpt therefrom:

“The Court will further take notice that in the trial court, page 125 of the record and in his brief in

this court, pages 26 and 27 thereof, appellant's counsel urged his opinion that in view of the recent trend of decisions of the high federal tribunal the statute condemned by the majority in the *Hoeper* case (*Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248) would now be upheld as valid legislation on the basis of the dissenting opinion of the minority, Justices Stone, Brandeis and Holmes, and the unanimous opinion of this court in *Hoeper v. Wisconsin Tax Commission*, 202 Wis. 493."

The State Supreme Court ruled adversely to the petitioner on this day by a denial thereof, page 49 of the record.

Reasons Relied On for the Allowance of the Writ.

QUESTION I.

The State and its instrumentality, the Wisconsin Tax Commission, after the decision in the *Hoeper* case by this Court, was estopped upon the facts appearing in this case, as against the petitioner, from retroactively challenging the constitutionality of its own enactment and acts thereunder prior to the decision in that case in that the respondent State had itself procured the enactment of the act in controversy and enforced it to its advantage for a period of approximately twenty years, and the Supreme Court of the State had twice adjudicated its constitutionality under the Federal Amendment prior to the decision of this Court in the *Hoeper* case. It is one thing for Mr. Hoeper, not having waived the constitutionality of the Act and asserted its unconstitutionality, to challenge its validity. It is quite another thing for the State, in another case as against a taxpayer who has waived its constitutionality, to itself challenge the constitutionality of its own act after having been a party thereto and profited thereby. That the constitutional guaranties operate in favor of the

citizen and against the State and are not to be employed by the State as against the citizen has been expressly ruled by this Court to apply to questions of unconstitutional assessments under the taxing power. The decisions of this Court in support of this proposition will be found under the discussion of this question in petitioner's brief filed in support hereof.

QUESTION II.

That the State's own instrumentality, in this case the Wisconsin Tax Commission, was disqualified from challenging the constitutionality, under the Fourteenth Amendment, of the State taxing act in its application to the petitioner is ruled by the holding of this Court in *Columbus and Greenville Railway Company v. W. J. Miller, State Tax Collector* (1931), 283 U. S. 96, pages 99 and 100. Pertinent excerpts from this decision will be found under the discussion of this question in petitioner's brief filed in support hereof.

QUESTION III.

That the taxpayer may waive the unconstitutionality of a State tax statute has been expressly decided by this Court in well-considered decisions. For the State to disregard such waiver in cases involving constitutional rights where it is thought to be prejudicial to the State and to urge the waiver in cases where it is thought by the State to be advantageous so to do in litigation involving such subject matter is a wholly totalitarian concept and alien to our system of jurisprudence. The decisions of this Court in support of this proposition will be found under the discussion of this question in petitioner's brief filed in support hereof.

QUESTION IV.

It is respectfully submitted that the dissenting opinion of this Court in the *Hoeper* case (*Hoeper v. Tax Commis-*

sion of *Wisconsin*, 284 U. S. 206, 218) written by Justice Holmes and concurred in by Justices Brandeis and Stone, wherein it was held that husband and wife, as members of a distinct status, namely, the marital status, were subject to classification for taxation on a different basis from that of persons not sustaining that status, and that accordingly the State statute in controversy was a valid exertion of legislative power by the State, is a correct exposition of constitutional law with respect to the subject of classification for tax purposes and that this Court may, and it is hoped will, embrace the earliest opportunity to overrule the majority opinion because of the fallacy inherent both in the premise and conclusion reached therein, and because it is so patently out of harmony with the great weight and preponderance of the decisions of the Court on the subject of classification for purposes of taxation. Prior to the decision of this Court in the *Hoeper* case the State Supreme Court had twice affirmed the validity of this statute under the Fourteenth Amendment in the cases of *Income Tax Cases*, 148 Wis. 456, 513, and *Hoeper v. Wisconsin Tax Commission*, 202 Wis. 493.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued by this Court for the review and reversal of said judgment, as provided by law and the rules and practice of this Court.

A. W. SCHUTZ,
Attorney for Petitioner.

STATE OF WISCONSIN,
Milwaukee County, ss:

A. W. Schutz, being duly sworn, says that he is the attorney for above named petitioner, Charles A. Miller; that he has read the foregoing petition by him subscribed and

that the facts stated therein are true to the best of his knowledge and belief.

A. W. SCHUTZ.

Subscribed and sworn to before me this 12 day of February, 1943.

RAYMOND T. ZILLMER,

[SEAL.] *Notary Public, Milwaukee County, Wis.*

My Commission Expires 1/19/47.

